92-1408

Supreme Court, U.S.
FILED
DEC. 28 1992
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOHN PATRICK ROGALA, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE FIFTH CIRCUIT'S RETROACTIVE APPLICATION OF A CLARIFYING AMENDMENT TO THE UNITED STATES SENTENCING GUIDELINES, VIOLATES THE *EX POST FACTO* PROVISIONS OF THE CONSTITUTION?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Mr. John Patrick Rogala and the United States.

The United States is the respondent before this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN PATRICK ROGALA, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner John Patrick Rogala respectfully prays that a writ of certiori issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 18, 1992. Petition for rehearing in the Fifth Circuit was denied September 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reprinted in the appendix hereto, p. A-1 *infra*. The per curiam opinion was not published. The Court of Appeals did not issue an opinion in connection with its denial of

Petitioner's petition for panel rehearing. p. A-4, *infra*. The district court did not issue an opinion.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 18 U.S.C. § 3742.

The Court of Appeals affirmed the judgment of the District Court in an order entered August 18, 1992. Panel rehearing was denied on September 30, 1992.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The amended introductory commentary to United States Sentencing Guideline § 3B1.1 provides in relevant part:

> The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of section 1B1.3 (Relevant Conduct), i.e., all conduct included under section 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

Prior to the amendment, which was effective November 1, 1990, the introductory commentary read as follows in relevant part:

> This part provides adjustments to the offense level based upon the role the defendant played in committing the offense.

The actual guideline, at all times pertinent to this case, reads as follows:

§ 3B1.1 Aggravting Role

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

The entire Guideline is reproduced at page A-5.

STATEMENT OF THE CASE

Petitioner Rogala was a member of a conspiracy, the primary business of which was to distribute cocaine in the central Texas area. Rogala held a position of some importance within the conspiracy, although he was not its "kingpin".

Rogala's chief role was to purchase cocaine in Houston from his source and resell the cocaine to others. These transactions took place from September of 1988 to the summer of 1989. Either Rogala or one Townsen, under Rogala's direction, would park a car in a specified mall. Rogala or Townsen would then leave the car. The source, who had a key to the car, would then drive the car away, load cocaine into the vehicle, and return the car to the parking lot.

Rogala directed other participants in the cocaine business as well, but the scope of these actions was outside that of the Houston cocaine business of 1988.

Rogala pleaded guilty to possessing 500 grams of cocaine on November 1, 1988, with the intent to distribute. Rogala also pleaded guilty to a single count of money laundering.

The presentence investigatory report recommended giving Rogala a four point enhancement under Guideline § 3B1.1(a) because Rogala had directed or led five or more participants during the course of the conspiracy. Rogala objected, contending that the four level enhancement should only apply when the conduct supporting the enhancement was related to the offense of conviction. The district court overruled Rogala's objections.

Rogala appealed to the Fifth Circuit, contending that Guideline § 3B1.1 prior to 1990 did not contemplate looking to conduct not embraced in the offense of conviction. Rogala further contended that any interpretation of the guideline to the contrary which relied on the 1990 "clarifying" amendment to the commentary would pose ex post facto concerns. The Fifth Circuit, without addressing the ex post

fact argument, affirmed. Petition for panel rehearing was denied.

REASONS FOR GRANTING THE WRIT

Petitioner's case brings to this Court the question of whether an amendment's label as "clarifying" is controlling, or whether a court should examine its actual impact on a defendant in addressing ex post facto concerns.

A. THE CIRCUITS ARE SPLIT ON THIS ISSUE

The issue presented is one on which the Circuits have split. See *United States v. Murillo*, 933 F.2d 195, 198 n.1 (3rd Cir. 1991); *United States v. Saucedo*, 950 F.2d 1508, 1513-1517 (10th Cir. 1991); *United States v. Rodgers*, 951 F.2d 1220 (11th Cir. 1992); *United States v. Furlow*, 952 F.2d 171 (8th Cir. 1992). Other circuits have been expressly critical of the Fifth Circuit's handling of the ex post facto question: "We decline to perform such judicial sleight of hand and make constitutional issues disappear." *Saucedo*, 950 F.2d at 1515 n.11.

In light of the inevitability of similar problems arising within the context of the Sentencing Guidelines, the issue presented merits clear resolution by this nation's highest court.

B. THE AMENDMENT RETROACTIVELY CHANGED THE LAW.

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." See Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. In order to fall within the ex post facto prohibition, a criminal law must possess two critical elements. First, the law "must be

retrospective, that is, it must apply to events occurring before its enactment." Second, "it must disadvantage the offender affected by it." Thus, a defendant must be sentenced according to presumptive sentencing guideline schemes as those schemes exist at the time of the offense, not as they exist at the time of sentencing. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

In order to determine whether the clarifying amendment to the commentary changed the law, a brief examination of the law prior to the amendment is merited.

Under the Guideline, enhancement for leadership is expressly limited to the "defendant's role in **the** offense". (emphasis supplied) The prior commentary also read, "This part provides adjustments to the offense level based upon the role the defendant played in committing **the** offense." (emphasis supplied) Not surprisingly, the courts read § 3B1.1 as referring to conduct related to "the" offense and not to "an" or "any" offense. The Fifth Circuit had always construed "the offense" as the offense of conviction since the first time the issue was visited upon the court of appeals. *United States v. Foster*, 876 F.2d 377, 378 (5th Cir. 1989). In *United States v. Barbontin*, 907 F.2d 1494, 1497 (5th Cir. 1990), the Fifth Circuit reversed as "the government failed to demonstrate that a minimum of five participants were involved in the **precise transaction** underlying the conviction." (emphasis in original). The Fifth Circuit went on to hold that while the district court could make inferences, it could "not look beyond the offense of conviction to enlarge the class of participants." *Barbontin*, 907 F.2d at 1498. The Fifth Circuit rejected an interpretation of § 3B1.1 where "a four level adjustment may be imposed incident to larger drug-trafficking activities which are not the subject of the conviction." *Id.*

The 1990 amendment to the § 3B1.1 introductory commentary had an immediate and drastic impact on the courts.[1] This was so even though the Sentencing Commission labeled it as "clarifying". See United States Sentencing Guidelines, *Appendix C*, ¶ 345.

In the Fifth Circuit, the amendment was given retroactive effect. Now all relevant conduct, not just conduct tied to the offense of conviction, would be considered for § 3B1.1 purposes. *United States v. Mir*, 919 F.2d 940 (5th Cir. 1990). The *Mir* court distinguished *Barbontin* and other cases on the facts, but it is plain that the very legal standard for § 3B1.1 had changed because of the new commentary: "This language [of the new commentary] shows that section 3B1.1 is intended to comport with other guidelines sections allowing a sentencing judge to look beyond the narrow confines of the offense charged **to consider all relevant conduct**." *Mir*, 919 F.2d at 945 (emphasis supplied).

Other Circuits found that the impact of the clarifying amendment was substantial and declined to apply it retroactively, citing ex post facto concerns. See cases cited *supra*.

The "clarifying" amendment has actually worked to change the law regarding § 3B1.1 in the Fifth Circuit. Before the amendment, the Fifth Circuit quite naturally interpreted § 3B1.1 as limited to conduct arising from transactions giving rise to the offense of conviction. After *Mir* accepted the amended commentary retroactively, the enhancement could be given for any relevant conduct.

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[1] The introductory commentary carries considerable weight. Guidelines § 1B1.7 provides that "it may interpret the guideline or explain how it is to be applied."

The change is retroactive, as the offense for which Rogala was convicted took place in 1988, well before the 1990 amendment became effective. The amendment was applied to Rogala, as the district court specifically relied on the *Mir* holding to enhance his sentence. See p. A-7.

Rogala has been disadvantaged. Rogala did direct Townsen in transactions similar to the offense of conviction. Others were directed by Rogala in other schemes distant in time and place from the Houston cocaine transaction. While these transactions may fall under the relevant conduct umbrella, they had nothing to do with the transaction which led to Rogala's conviction. The Court of Appeals relied on this relevant conduct in affirming Rogala's conviction: "As this organization involved more than five participants, the increase in Rogala's offense level was proper." See p. A-3.

Rogala should have been sentenced under the Guidelines as a level 34 under the Guidelines. His sentence would thus have been 168-210 months. Instead, Rogala's offense level was increased by four, and his sentence under the Guidelines became 262-327 months. United States Sentencing Guidelines §5A [Table]. Like the petitioner in *Miller v. Florida, supra*, Rogala has plainly been substantially disadvantaged by the retroactive application of the amendment.

C. THE EX POST FACTO ISSUE PRESENTS A SIGNIFICANT CONSTITUTIONAL DIMENSION.

This issue, aside from bringing to this Court a question on which the circuits have split, also possesses important constitutional dimensions. The ex post facto clauses ensure that enactments "give fair warning of their effect and permit individuals to rely on their meaning until

explicitly changed." *Miller*, 482 U.S. at 430. This assurance is not merely an abstract nicety. Often, a defendant's perspective of punishment is a significant factor entering into his decision to plea bargain, as has been recognized by this Court. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). A defendant such as Rogala, acting on the advice of competent counsel, may very well decide to plead.[2] That decision is now clouded for future similarly situated defendants. Should this and other decisions relying on *Mir* stand, the law will be rendered instrinsicly unpredictable. Virtually any slightly vague area of the law may be "clarified" to the defendant's considerable detriment. Rogala's term of imprisonment, for example, was made nearly twice as onerous by a amendment issued exactly two years after his offense.

The United States Sentencing Commission should not be permitted to retroactively and substantially amend the Guidelines in the guise of issuing "clarifying" amendments. The clear and unanimous holding of *Miller v. Florida* demands that Rogala be resentenced under the Guidelines as they stood in 1988, the time of the offense.

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[2] Whether or not Rogala relied on the the previous interpretation of § 3B1.1 is immaterial to the instant case. Ex post facto inquiries look to the challenged provision, not the particular individual. *Weaver v. Graham*, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981).

CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN PATRICK ROGALA, Petitioner

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UNITED STATES OF AMERICA, Respondent.

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8624
Conference Calendar

D.C. Docket No. W-90-CR-121(4)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JOHN PATRICK ROGALA,
Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

August 18, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8624
Conference Calendar

D.C. Docket No. W-90-CR-121(4)
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JOHN PATRICK ROGALA,
Defendant-Appellant

- - - - - - - - - -

Appeal from the United States District Court
for the Western District of Texas
USDC No. W-90-CR-121(04)

- - - - - - - - - -

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM[1]:

The district court increased Rogala's offense level by four points under § 3B1.1(a) of the Sentencing Guidelines because he was the organizer of criminal activity including five or more participants. Rogala argues that this increase was inappropriate because he pleaded guilty to a single charge of possession with intent to distribute cocaine and that less than five individuals participated in that transaction.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In United States v. Barbontin, 907 F.2d 1494, 1498 (5th Cir. 1990), the Court held "that a Section 3B1.1(a) adjustment is anchored to the transaction leading to the conviction." In United States v. Manthei, 913 F.2d 1130, 1137 (5th Cir. 1990), the Court held that "it is not necessary for participants to be charged in the offense in order to be considered for § 3B1.1(a) purposes." In United States v. Mir, 919 F.2d 940, 945 (5th Cir. 1990), the Court specifically rejected an interpretation of Barbontin and Manthei that defined a "transactional participant so narrowly as to preclude any examination of the context of the crime beyond the minimal elements necessary for conviction." Rogala operated as a wholesale distributor of cocaine. It is undisputed that between 1988 and 1989 he distributed 93 kilos of cocaine. While five people did not participate in the sale of cocaine to which Rogala pleaded guilty, he would not have been able to sell the cocaine without his wholesale distribution organization. As this organization involved more than five participants, the increase in Rogala's offense level was proper.

Rogala also objects to the testimony of Elizabeth Chapman, a special agent with the IRS, given at sentencing. Rogala has not shown that Chapman's testimony was "materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Further, Rogala was allowed to cross-examine Agent Chapman. See United States v. Byrd, 898 F.2d 450, 453 (5th Cir. 1990) (opportunity to question probation officer sufficient opportunity for confrontation).

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8624

D.C. Docket No. W-90-CR-121(4)
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JOHN PATRICK ROGALA,
Defendant-Appellant

- - - - - - - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - - - - - - -

ON PETITION FOR REHEARING
(September 30, 1992)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

PART B - ROLE IN THE OFFENSE

Introductory Commentary

This part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction. However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.

When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 345).

§3B1.1 Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved

five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

THE COURT: The objection concerning being an organizer or leader will not be granted. The Court finds that the opinion of Judge Smith in the Mear [sic] case is more compelling than the opinion of Judge Smith in the Barrentine (phonetically), and finds that Mr. Rogala was an organizer or leader in the criminal activity that involved five or more persons, or equally important and equally evident from the evidence that the activity was otherwise an extensive criminal activity.

The Offense Level would be reduced by two to a Level 40, the Guideline range would become 324 to 405, if I'm correct in my --

MR. MOORE: I believe it's a Level 38, Your Honor.

MR. SNYDER: I believe they had it as a Level 40, Your Honor, in the report on page 69, Your Honor, so that would take it to a Level 38.